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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether respondent's agreement to a term of probation that authorized any law enforcement officer to search his person or premises with or without a warrant, and with or without individualized suspicion of wrongdoing, constituted a valid consent to a search by a law enforcement officer investigating crimes.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 219 F.3d 1138.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2000. A petition for rehearing was denied on October 5, 2000 (App., *infra*, 39a). On December 26, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On May 29, 1998, respondent Mark James Knights was placed on summary probation for a drug offense under California law.[1] Summary probation in California does not involve direct supervision by a probation officer. App., *infra*, 4a. As a condition of probation, however, respondent signed a form by which he agreed to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." C.A. E.R. 73; App., *infra*, 4a. The consent-to-search term, sometimes known as the "Fourth Waiver," see *United States* v. *Ooley*, 116 F.3d 370, 371 (9th Cir. 1997), cert. denied, 524 U.S. 963 (1998), is a common term of probation in California. The California Supreme Court has held that the Fourth Waiver constitutes a valid consent to search. See, *e.g.*, *People* v. *Bravo*, 43 Cal. 3d 600, 605-611 (1987), cert. denied, 485 U.S. 904 (1988).

[1] See C.A. E.R. 58, 73. On that same date, respondent was sentenced to 90 days in jail, to commence on July 3, 1998. *Id.* at 58, 67.

2. Three days after respondent was placed on probation, a Pacific Gas & Electric (PG&E) power transformer and adjacent Pacific Bell telecommunications vault near the Napa County Airport were pried open and set on fire with an incendiary device. App., *infra*, 2a-3a. Respondent had been suspected of prior acts of vandalism against PG&E property, based on his longstanding grudge against the company stemming from a theft-of-services complaint made against him by PG&E investigators and a prior discontinuation of respondent's electrical services for failure to pay his bill. Accordingly, he immediately became a suspect in the case. C.A. E.R. 58; App., *infra*, 2a. After the sheriff's office made a variety of observations that suggested that respondent might be involved in the vandalism,[2] on June 3, 1998, a sheriff's detective searched respondent's apartment, relying on the consent-to-search condition of respondent's probation order. *Id.* at 4a. Based on the evidence found in the search—including detonation cord, ammunition, liquid chemicals, chemistry and electrical manuals, drug paraphernalia, and a brass padlock stamped "PG&E"—respondent was arrested. C.A. E.R. 54; App., *infra*, 4a-5a.

3. Respondent was subsequently indicted by a federal grand jury for conspiracy to commit arson, in violation of 18 U.S.C. 371 and 844(i) (1994 & Supp. IV 1998); being a felon in possession of a firearm, in vio-

[2] Shortly after the arson, a sheriff's deputy drove by respondent's residence and noticed that the hood of the pick-up truck parked in front was warm, suggesting a recent arrival. In addition, an associate of respondent was seen disposing of what appeared to be pipe bombs, and the associate's pick-up truck contained explosive materials and brass padlocks that appeared to match those taken from the PG&E power vault. App., *infra*, 3a-4a.

lation of 18 U.S.C. 922(g)(1); and possession of an unregistered destructive device, in violation of 26 U.S.C. 5861. C.A. E.R. 1-5; App., *infra*, 5a. Respondent moved to suppress the evidence obtained in the June 3 search. *Ibid.*

Relying principally on the Ninth Circuit's decision in *United States* v. *Ooley*, *supra*, the district court granted respondent's motion to suppress. App., *infra*, 15a-38a. The court explained that "[a]lthough not directly addressing the consent issue, [*Ooley*], implicitly if not directly, stands for the proposition that acceptance of a search clause as a condition of probation does not fully abrogate a defendant's Fourth Amendment rights." *Id.* at 25a. The court found that the detective who conducted the search had a "reasonable suspicion" that respondent may have been involved with incendiary materials, "the manufacture of which would be inconsistent with the rehabilitative aspects of his probation." *Id.* at 30a. The court held, however, that the search was conducted for the purpose of obtaining evidence in a criminal investigation into arson or manufacture of incendiary devices. *Id.* at 33a. Based on its conclusion that the search of respondent's house was undertaken for investigative rather than probationary purposes, the court held that the search was invalid and that the items seized during it should be suppressed. *Id.* at 33a-37a.

4. The court of appeals affirmed. App., *infra*, 1a-14a.

The court of appeals acknowledged that "a person can consent to a search of his home," and that "[t]here * * * can be little doubt that [respondent] did consent to searches when he agreed to the terms of his probation." App., *infra*, 7a-8a. The court stated, however, that prior Ninth Circuit decisions "have made it clear that [a probationer's] consent must be seen as limited to

probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term." *Id.* at 8a.

The court of appeals found no clear error in the district court's determination that the sheriff's department was investigating criminal activity, rather than conducting a "probation search," since the searching officer was interested in "ending the string of crimes" of which respondent was suspected and was not "interested in [respondent's] rehabilitation." App., *infra*, 10a. While the court conceded that "a probation officer may also wish to end wrongdoing by a probationer," the court found that the law enforcement officer in this case "was using the probation term as a subterfuge to enable him to search [respondent's] home without a warrant." *Ibid.*[3]

The court of appeals also concluded that *Whren* v. *United States*, 517 U.S. 806 (1996), did not undermine its distinction between probation searches and investigation searches. While *Whren* relied on the principle that the lawfulness of a Fourth Amendment intrusion based on probable cause turns on the objective facts, and not on the subjective motivation of the searching officer, the court of appeals found that the issue here is the different one of whether the officers had consent to search respondent's residence for law enforcement purposes in the first place, *i.e.*, "whether the consent

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[3] The court of appeals acknowledged that "a true probation search can serve [the] ends" of deterring criminal activity by the probationer. App., *infra*, 13a. The court refused, however, to hold that the search in this case could be upheld as serving the same purposes. The court stated that to sustain the search on that basis would "indirectly eliminate our cases which rely on the difference between probation and investigation searches." *Ibid.*

covers what the officer did." App., *infra*, 11a. The court acknowledged that "the California Supreme Court disagrees with our *Whren* analysis." *Ibid.* (citing *People* v. *Woods*, 21 Cal. 4th 668, 677-681 (1999), cert. denied, 120 S. Ct. 1429 (2000)). It stated, however, that the California Supreme Court "does not control our reading of federal constitutional law, and for the reasons already stated, we find its analysis unpersuasive." *Ibid.*

REASONS FOR GRANTING THE PETITION

It is well established that searches based on consent are constitutionally permissible, without the need for a warrant or particularized cause. In this case, however, the court of appeals concluded that the Fourth Amendment prohibits law enforcement officers who are seeking evidence of criminal activity from searching based on the consent given by a California probationer to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." The court of appeals thus reaffirmed a distinction in its cases between "probation" searches, which are permissible, and "investigation" searches, which are not. The court of appeals' holding is incorrect, and—as the court of appeals acknowledged—in conflict with the position of the Supreme Court of California, which has long upheld searches of adult probationers based on consent, without distinguishing between "probation" searches and "investigation" searches. The court of appeals' holding thus threatens to cause substantial disruption of law enforcement efforts in California, where state officers

are now operating under a dual system of inconsistent legal standards.

The court of appeals' holding warrants this Court's review. In *Pennsylvania Board of Probation & Parole* v. *Scott*, 524 U.S. 357 (1998), this Court invited the parties to brief and argue the question whether "a search of a parolee's residence [must] be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole." 522 U.S. 992 (1997). The Court ultimately did not reach that issue in *Scott*, however, instead resolving the case on other grounds. Because the legal issue remains important, and because of the adverse practical consequences flowing from the court of appeals' decision, this Court's resolution of that question is now warranted.[4]

1. The court of appeals' holding in this case is the latest in a line of cases invalidating searches based on California "Fourth Waiver" consents, when the court of appeals has concluded that the search of the probationer was not carried out with a view towards rehabilitation but was instead an impermissible investigative search. "[W]e have long recognized," the court has stated, that "the legality of a warrantless

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[4] While *Scott* was pending before this Court, the government filed a petition for certiorari in *United States* v. *Ooley*, No. 97-1144, another case involving a California probation search conducted pursuant to the Fourth Waiver, and suggested that the petition be held pending the Court's decision in *Scott*. See 97-1144 Pet. at 5-6. After the Court issued its decision in *Scott* without reaching the consent issue, the Court denied certiorari in *Ooley*. See 524 U.S. 963 (1998). The Ninth Circuit's refusal to reconsider its rule in this case, and its continued conflict with decisions of the California Supreme Court, make clear that the issue warrants plenary review at this time.

search depends upon a showing that the search was a true probation search and not an investigation search." *United States* v. *Ooley*, 116 F.3d 370, 372 (9th Cir. 1997) (collecting cases), cert. denied, 524 U.S. 963 (1998). The Ninth Circuit's law in this area is further complicated by holdings that even a probation officer cannot make a valid probation search if he is in fact acting as a "stalking horse" for the police in a criminal investigation. See *United States* v. *Watts*, 67 F.3d 790, 793-794 (9th Cir. 1995) ("A probation officer acts as a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers."), rev'd on other grounds, 519 U.S. 148 (1997) (per curiam).[5]

In invalidating the search in this case, the court of appeals at times implied that "investigation" searches do not fall within the scope of a probationer's consent.[6]

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[5] The "stalking horse" doctrine is particularly difficult to apply because the Ninth Circuit has made clear that "collaboration between a probation officer and police does not in itself render a probation search unlawful." *Watts*, 67 F.3d at 794. It has also stated that "the warrantless search of a probationer's home need not necessarily be initiated, conducted, or even supervised by a probation officer to qualify as a probation search." *Ooley*, 116 F.3d at 372. Yet it has also held that a probation search may be illegal if the probation officer approves the search as a "stalking horse" for the police, and that a probation officer acts as a "stalking horse" if he conducts a probation search "on prior request of and in concert with law enforcement officers." See *United States* v. *Richardson*, 849 F.2d 439, 441 (9th Cir.), cert. denied, 488 U.S. 866 (1988). The line-drawing required to implement those positions is thus subtle and unpredictable.

[6] See App., *infra*, 8a (prior Ninth Circuit decisions "have made it clear that [a probationer's] consent must be seen as limited to probation searches, and must stop short of investigation searches"); *id.* at 11a (the question in this case is "whether * * * there was consent to the search in the first place," and the answer "depends on whether the consent covers what the officer did").

That view, however, is irreconcilable with the language of the consent itself, in which respondent agreed without qualification to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." C.A. E.R. 73; App., *infra*, 4a. There is no language in that consent that limits its scope to searches conducted for a particular reason. See *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"). The court of appeals did not suggest otherwise. Such a construction of respondent's consent would, moreover, be squarely at odds with the California Supreme Court's consistent interpretation of a provision that is a standard term of probation in the State. See pp. 9-11, *infra*. The basis for the court of appeals' opinion, in fact, is its legal conclusion that a probationer's consent to a search for *investigatory* purposes is invalid and unenforceable as a matter of Fourth Amendment law. See App., *infra*, 8a ("We simply have refused to recognize the viability of a more expansive probationary consent to search term.").

That analysis of Fourth Amendment law is in square conflict with decisions of the Supreme Court of California. "For nearly three decades, [the Supreme Court of California] has upheld the legality of searches authorized by probation terms that require probationers to submit to searches of their residences at any time of the day or night by any law enforcement officer with or without a warrant." *People* v. *Woods*, 21 Cal. 4th 668, 675 (1999), cert. denied, 120 S. Ct. 1429 (2000); see

People v. *Robles*, 23 Cal. 4th 789, 795 (2000) ("In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term.").[7] In *People* v. *Bravo*, 43 Cal. 3d 600 (1987), cert. denied, 485 U.S. 904 (1988), the court explained that a consent search of a probationer's residence is valid because "[a] probationer consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term." *Id.* at 608. The court thus upheld a search by law enforcement officers who were acting on a tip that the probationer was involved in the sale of narcotics. *Id.* at 602-603. The court made clear that the consent authorized searches to fulfill "the rehabilitative and reformative purposes of probation *or other legitimate law enforcement purposes*." *Id.* at 610 (emphasis added).[8]

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[7] In *Robles*, the court held that a probationer's prior consent to searches of his residence did not validate a search where (a) the searching officers were unaware of the probation condition at the time they executed the search, and (b) the purpose and effect of the search was to obtain evidence of wrongdoing by the probationer's brother, who shared the residence. See 23 Cal. 4th at 794-800. The court distinguished *Woods* as a case "which concerned the legality of a home search premised upon a known probation condition." *Id.* at 797. In this case, the officer who conducted the search of respondent's apartment submitted a declaration attesting that he was aware of respondent's probationary status and the attendant search condition before he performed the search. C.A. E.R. 49-50.

[8] In assessing the validity of Fourth Waiver searches of adult probationers, the California Supreme Court has explicitly relied on a consent rationale. See *Woods*, 21 Cal. 4th at 674-676. In contrast, where particular offenders are not offered the opportunity to decline release—such as parolees and juvenile probationers—the California Supreme Court has not relied on a consent theory in upholding warrantless searches without particularized cause. The Court has instead sustained the searches on the theory that such persons have a reduced expectation of privacy in light of the conditional nature of their release, and that the interest in maintaining close supervision of such persons justifies the intrusions in question. See *In re Tyrell J.*, 8 Cal. 4th 68, 81-90 (1994) (juvenile probationers), cert. denied, 514 U.S. 1068 (1995); *People* v. *Reyes*, 19 Cal. 4th 743, 747-754 (1998) (adult parolees), cert. denied, 526 U.S. 1092 (1999).

The court of appeals' decision in this case cannot be reconciled with *Woods*, *Bravo*, and other decisions of the California Supreme Court holding that a criminal defendant's acceptance of a probation search condition constitutes a valid and enforceable consent to the search of all areas subject to the probationer's control. In particular, the California Supreme Court has specifically rejected the contention that a search based on such a consent is invalid if the searching officer is motivated by a desire to investigate possible criminal activity. In *Woods*, for example, the court accepted, as supported by substantial evidence, the trial court's finding that the searching officer's "sole reason for searching the [probationer's] residence was to discover evidence against [the probationer's boyfriend] and not to investigate whether [the probationer] had violated her probation." 21 Cal. 4th at 674. The court nevertheless held that the search was authorized by the consent that the probationer had given as a condition of release on probation. *Id.* at 674-682.

The court in *Woods* concluded that a focus on the subjective intent of the searching officer was inconsistent with this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996). See 21 Cal. 4th at 678-680. It explained "whether the purpose of the search is to

monitor the probationer or to serve some other law enforcement purpose, or both, the search in any case remains limited in scope to the terms articulated in the search clause and to those areas of the residence over which the probationer is believed to exercise complete or joint authority." *Id.* at 681. "Given such constraints," the court concluded, "there is little to be advanced by validating a search merely upon the searching officer's ability to convincingly articulate the proper subjective motivation for his or her actions." *Ibid.* The conflicting positions of the California Supreme Court and the Ninth Circuit with respect to the relevance of the searching officer's purpose merits this Court's review.

2. The court of appeals' decision is incorrect.

a. As a general matter, "a search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973), and the validity of the search does not turn on the officers' possession of either individualized suspicion or a warrant. Accord, *e.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). More generally, "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995); see also *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver.").

Those principles are applicable here. This Court has recognized that an individual may, within broad limits, enter into arrangements with the government under which the individual relinquishes constitutional rights in return for a promise of favorable treatment. So long as the individual is accurately apprised of the options available to him, such agreements are generally

enforceable even when the individual is forced to choose between unattractive alternatives.

That principle is demonstrated most vividly by this Court's repeated recognition that the government may attempt through negotiation to persuade a defendant to plead guilty to a criminal charge. See, *e.g.*, *Mezzanatto*, 513 U.S. at 209-210 ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.") (internal quotation marks omitted); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process"; defendant's plea held to be voluntary even though it "may have been induced * * * by fear of the possibility of a greater penalty upon conviction after a trial"); *Brady* v. *United States*, 397 U.S. 742, 755 (1970) ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.").

Much the same analysis applies where an individual has consented to future searches in order to obtain release on probation. In *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), this Court observed that "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." *Id.* at

874.[9] If respondent could have validly entered into a plea agreement providing for confinement in a particular penal institution, there is no reason that he could not also bargain for a less onerous punishment—*i.e.*, release into the community on condition that his residence could be searched at any time. Indeed, enabling defendants to consent to such search terms may further their long-term interests in choosing a less onerous form of supervision. Compare *Bravo*, 43 Cal. 3d at 609 ("Were we to conclude that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose.").

b. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose waiver is at issue. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). This Court's unconstitutional conditions jurisprudence suggests that a State may not condition an individual's

[9] In *Griffin*, this Court upheld a warrantless search of a probationer's house based on a state regulation that permitted such searches where "reasonable grounds" existed to believe that contraband would be found. The Court did not adopt a "reasonable grounds" (or other individualized suspicion) requirement as a constitutional floor, and it did not consider whether a person released on probation could validly consent to searches without individualized suspicion as a condition of release.

release on probation upon his agreement to forgo the exercise of a constitutional right—*e.g.*, the First Amendment right to engage in religious observance, or to make public statements critical of the government—that is wholly unrelated to his status as a probationer.

A requirement that probationers consent to search, by contrast, directly furthers the State's interest in the effective administration of its probation system. Probationers present a heightened risk of committing further criminal or other antisocial acts, thus justifying close monitoring and supervision. See *Griffin*, 483 U.S. at 880 ("it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law"). The purpose of conditional release is to assist in the probationer's reintegration into the community, while minimizing the threat to the public safety and welfare that release may entail. A search designed to assess the probationer's compliance with the conditions of his release, including the condition of not violating the criminal law, is therefore reasonably related to the benefit offered by the government as a quid pro quo.

c. A probationer's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is incarceration. It has been suggested that a potential probationer or parolee has no choice but to accept a consent to search provision.[10]

[10] See, *e.g.*, 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(b), at 764-765 (3d ed. 1996) ("to speak of consent in this context is to resort to a manifest fiction, for the probationer who purportedly waives his rights by accepting such a condition has little genuine option to refuse") (citation and internal quotation marks omitted); *Commonwealth* v. *Walter*, 655 A.2d 554, 556 n.1 (Pa. Super. Ct. 1995) ("Needless to

That suggestion appears to rest on one of two propositions. First is the notion that an individual would not, under any circumstances, make a voluntary decision to accept a prison term. That proposition is demonstrably false: criminal defendants can and often do enter into plea agreements that provide for substantial periods of incarceration, generally because they conclude that their alternatives are even more unattractive. This Court has repeatedly recognized that a plea of guilty is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. See p. 13, *supra*.

Alternatively, the view that a probationer lacks any true choice in the matter may rest instead on the perception that no one would choose to spend time in prison *in preference to release on probation* because probation, even with a consent-to-search condition, is substantially less onerous than incarceration. That reasoning is also flawed. The government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more advantageous than the other. No one would suggest, for example, that a defendant's guilty plea is involuntary if the government offers him a favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

d. The court of appeals acknowledged both that "a person can consent to a search of his home," and that respondent "did consent to searches when he agreed to

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say, there is no bargaining for terms of parole, nor is it likely that any prisoner is going to refuse parole simply because the terms are unfavorable.").

the terms of his probation." App., *infra*, 7a-8a. The court held, however, that respondent's "consent must be seen as limited to probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term." *Ibid.* The court of appeals' effort to distinguish between "probation" and "investigation" searches is misguided.

In *Whren* v. *United States*, 517 U.S. 806 (1996), this Court observed that it had consistently "been unwilling to entertain Fourth Amendment challenges based on the actual motivation of individual officers." *Id.* at 813. The Court explained that the "principal basis" for its refusal to consider the subjective motivation of the searching or seizing officer "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. See also *Bond* v. *United States*, 529 U.S. 334, 338 n.2 (2000) (in determining whether an officer's actions constitute a "search," "the issue is not [the officer's] state of mind, but the objective effect of his actions").[11]

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[11] In *City of Indianapolis* v. *Edmond*, 121 S. Ct. 447 (2000), the Court held that a traffic checkpoint violates the Fourth Amendment when its "primary purpose" is to serve general criminal law enforcement interests in interdicting narcotics. *Id.* at 458. The Court explained that, in contrast to cases such as *Whren* and *Bond*, "our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *Id.* at 457. The Court noted that "subjective intent was irrelevant in *Bond* because the inquiry that our precedents required focused on the objective effects of the actions of an individual officer." *Ibid.* This Court's consent-search precedents similarly focus on objective considerations, both in analyzing the scope of consent, see *Florida* v. *Jimeno*, *supra*, and in determining the reasonableness of an

The seizure in *Whren* was based on probable cause to believe that a traffic violation had been committed, 517 U.S. at 810, and the Court explained that the existence of probable cause ordinarily obviates the need for the sort of Fourth Amendment "balancing" process that might be necessary in other contexts, see *id.* at 817-819. A property owner's voluntary consent to search should lead to a similar Fourth Amendment conclusion: the search is valid if it is within the scope of the consent, regardless of a particular searching officer's motive or purpose. The intrusion is the same regardless of purpose, and nothing in this Court's decisions suggests that the propriety of a consent search depends on the searching officer's subjective motivation in requesting or acting upon the consent.

The purported distinction between "probation" and "investigation" searches is particularly unsound. The most fundamental term of probation is that an individual must refrain from committing further crimes. Where the probationer is suspected of additional criminal activity, a search designed to confirm or dispel that suspicion directly serves an important probation purpose. As the Court in *Griffin* explained, restrictions on a probationer's liberty "are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. These same goals require and justify the exercise of supervision to assure that the

officer's reliance on consent, see *Illinois* v. *Rodriguez*, *supra*. The objective approach of *Whren* and *Bond* is therefore applicable here.

restrictions are in fact observed." 483 U.S. at 875 (citation omitted).[12]

The court of appeals appeared to acknowledge that a probation search may be based *in part* on the desire to detect wrongdoing, but suggested that any search directed *only* at that goal (rather than at the rehabilitation of the probationer) cannot be regarded as a legitimate probation search. App., *infra*, 10a. That conclusion is without basis. Even where a search is conducted solely to determine whether a probationer has abused the "conditional liberty" (*Griffin*, 483 U.S. at 874) that the State has chosen to allow him, the search helps to ensure "that the community is not harmed by the probationer's being at large" (*id.* at 875) and thereby directly serves a core probation purpose. Cf. *New York* v. *Burger*, 482 U.S. 691, 712-713 (1987) (search intended to ensure that automobile junkyard

[12] In *Robles*, the Supreme Court of California stated that "searches that are undertaken pursuant to a probationer's advance consent must be reasonably related to the purposes of probation." 23 Cal. 4th at 797. The court concluded that "a search of a particular residence cannot be 'reasonably related' to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence." *Ibid.* The court did not suggest, however, that searches intended to confirm or dispel suspicion of a probationer's wrongdoing are insufficiently related to the purposes of probation to fall within the scope of a probationer's consent. To the contrary, it observed that "[w]arrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation." *Id.* at 795; see *id.* at 797 (explaining the court's prior holding in *Woods* "that, regardless of the searching officer's ulterior motives, the circumstances presented ample justification for a search pursuant to the probation clause at issue because the facts known to the officer showed a possible probation violation.").

did not facilitate automobile theft was a valid administrative search, notwithstanding the fact that the ultimate purpose of the administrative scheme paralleled that of the State's penal laws).

3. The Ninth Circuit's rule warrants this Court's review. The conflict between the Fourth Amendment standards announced by the state and federal courts in California means that evidence that is constitutionally admissible in state prosecutions must be excluded in federal prosecutions. The Ninth Circuit's rule therefore places state and local law enforcement officers in the most populous State in the Nation in the intolerable position of having to choose between following long-settled Fourth Amendment rulings of the state courts or those of the Ninth Circuit. The Ninth Circuit's rule suffers from the further complication that, even if state officers sought to comply with it, the involvement of law enforcement officers in a "probation" search may taint the entire search if the court concludes that the probation department was a "stalking horse" for law enforcement. See note 5, *supra*. And, to the extent that the Ninth Circuit's position means that evidence gathered in a probation search cannot be introduced in a federal prosecution, the conflict hinders efforts of federal and state authorities to engage in cooperative law enforcement.

The court of appeals' decision has additional ramifications for state law enforcement officers who may face damages actions under 42 U.S.C. 1983 (1994 & Supp. IV 1998). The doctrine of qualified immunity protects officers against damages liability for conduct that was objectively reasonable under prevailing law. *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999) (whether personal liability may be assessed "generally turns on the objective legal reasonableness of the action, assessed in light

of the legal rules that were clearly established at the time it was taken") (internal quotation marks omitted). In this case, however, the court of appeals stated that "[f]or at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional." App., *infra*, 12a-13a. That statement raises the prospect that, if state law enforcement officers are sued for damages in federal court under Section 1983 based on their participation in Fourth Waiver searches, they could be held to lack qualified immunity from suit, notwithstanding the California Supreme Court's repeated holdings that searches are consistent with the Fourth Amendment. Law enforcement officers should not be subject to pressures created by such conflicting legal regimes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10538

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARK JAMES KNIGHTS; STEVEN SIMONEAU,
DEFENDANTS-APPELLEES

[Argued and Submitted July 11, 2000]
[Filed Aug. 3, 2000]

Before: CANBY, REINHARDT, and FERNANDEZ, Circuit Judges.

FERNANDEZ, Circuit Judge:

The United States appeals from an order which suppressed evidence seized from the home of Mark James Knights in a warrantless search conducted by members of the Sheriff's Department of Napa County, California. It claims that the evidence was properly seized during a probation search. The district court disagreed; so do we. We affirm.

BACKGROUND

From 1996 on, Pacific Gas and Electric Company's facilities in Napa County had been subjected to vandalism over 30 times. Those incidents included short circuits caused by throwing chains onto transformers, damaging of gas power switches, and damaging of power pole guy wires. Suspicion had focused on Knights, and on his friend, Steven Simoneau. Many things contributed to that. In the first place, those vandalisms started after Knights' electrical services had been discontinued in March of 1996 because he not only did not pay his bill, but also had found a way to steal services by bypassing PG & E's meter. Detective Todd Hancock of the Sheriff's Department also thought it noteworthy that incidents of vandalism of PG & E property seemed to coincide with Knights' court appearance dates regarding the theft of PG & E services.

More than that, on May 24, 1998, Knights and Simoneau were stopped by a sheriff's deputy near a PG & E gas line. They could not explain their presence in the area to the deputy, who observed that Simoneau's pick-up truck contained pipes, pieces of chain, tools, and gasoline. The deputy asked to search the vehicle, but was refused permission. A few days later, a pipe bomb was detonated against the exterior of a building where a burglary had taken place. That building was not far from Knights' residence.

For our purposes, the final incident occurred on the morning of June 1, 1998. Some miscreant, or miscreants, had managed to knock out telephone service to the Napa County Airport by breaking into a Pacific Bell

telecommunications vault and setting fire to it. Brass padlocks which secured the vault and an adjacent PG & E power transformer had been removed, and a gasoline accelerant had been used to ignite the fire. Within a short time after that incident occurred, a sheriff's deputy drove by Knights' residence and observed Simoneau's truck parked in front. The deputy got out of his patrol car and felt the hood of Simoneau's truck. It was still warm at the time, which suggested that Knights and Simoneau might have been involved in the vandalism. The investigation focused even more purposefully upon them as a result.

Thus, on June 3, 1998, Hancock set up surveillance of Knights' apartment. At approximately 1:45 a.m., Knights and Simoneau arrived at the apartment in Simoneau's pick-up truck. The two proceeded to enter the apartment where they remained with the lights on until about 3:10 a.m. At that point, Simoneau emerged from the apartment carrying three cylindrical items cradled in his arms. On the basis of his training, Hancock believed those to be pipe bombs. Simoneau walked to the truck, placed an object shaped like a jar in the back of it, and then walked across the street to the bank of the Napa River, where he disappeared from view. Hancock then heard three splashes as Simoneau, seemingly, deposited those objects in the river. Simoneau returned to the truck without the cylinders, picked up a glass jar from the truck bed and wiped it with a cloth. He then climbed into that truck and departed.

Hancock trailed Simoneau until he stopped in a driveway. When Hancock entered the driveway Simoneau was not around, but Hancock discovered a number of

suspicious objects in and about the truck. In the bed of the truck were a Molotov cocktail and explosive materials. Also, a gasoline can and two brass padlocks, which seemed to fit the description given by PG & E investigators of the locks removed from the Pacific Bell and PG & E transformer vault two days earlier, were observed. The truck was seized, impounded, and later searched pursuant to a warrant.

With all of that information in hand, Hancock decided that he would conduct a warrantless "probation" search of Knights' home. As Hancock saw it, he did not need to obtain a warrant because at an earlier time Knights had been placed on summary probation after he was convicted of a state misdemeanor drug offense. A person on summary probation in California is not under the direct supervision of a probation officer.[1] However, in this case, a term of that probation required Knights to "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Relying upon that and the authorization of his supervisor, Hancock proceeded.

He began to organize the search at about 5:00 a.m. that morning, and conducted it at 8:00 a.m. after breaking through a door and entering the apartment where Knights was still abed. The search was productive. It turned up detonation cord, ammunition, unidentified liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-

[1] *See People v. Soto*, 166 Cal.App.3d 770, 774 n. 3, 212 Cal.Rptr. 696, 699 n. 3 (1985).

climbing spurs, drug paraphernalia, photographs and blueprints stolen from the burglarized building, and a brass padlock stamped PG & E. Needless to say, Knights was arrested.

Ultimately, Knights found himself in federal court because he was indicted for conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition. *See* 18 U.S.C. §§ 371, 922(g); 26 U.S.C. § 5861(d). He moved to suppress the evidence seized in the June 3, 1998, search, and the government asserted that it was conducted pursuant to a probation consent. The district court agreed with Knights that the claimed probation search was really a subterfuge for an investigative search and ordered suppression. This appeal followed.

STANDARD OF REVIEW

A district court's determination of whether there was consent to search is generally treated as a factual determination, but we have said that in "determining whether as a general rule certain types of actions give rise to an inference of consent, de novo review is appropriate." *United States v. Shaibu*, 920 F.2d 1423, 1425 (9th Cir. 1990). The district court's conclusion that the probation search of Knights' apartment was a subterfuge for a criminal investigation is a factual determination which we review for clear error. *See United States v. Watts*, 67 F.3d 790, 793-94 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 148, 117 S. Ct. 633, 136 L.Ed.2d 554 (1997).

DISCUSSION

The difficulties at the interface between a person's right to the security of his home and the needs of law enforcement are sempiternal. Nonetheless, the balance is weighted in favor of the home dweller for reasons with a weighty ancient lineage. Coke's Reports reflect that: "the house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose. . . ." *Semayne's Case* 5 Coke's Rep. 91a, 91b (K.B.1603). That meant not only that a person could defend his home against miscreants, but also that the King's officers were required to give proper notice before entry and had to enter in accordance with the law. *See id.* at 91b-92a. Sir Matthew Hale, who died in 1676, also emphasized that "every man by the law hath a special protection in reference to his house and dwelling." 1 Matthew Hale, Pleas of the Crown 547 (1736). And we read in Wood's Institutes that a sheriff cannot break into a home without first giving proper notice, and signifying the cause. *See* Thomas Wood, An Institute of the Laws of England 71 (1734). More than that, "[i]f a Justice of Peace makes a Warrant upon a bare Surmise, and by Virtue thereof One breaks a House . . . It is against Magna Charta." *Id.* at 615. Finally, as Blackstone said: "the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity; agreeing herein with the sentiments of antient Rome. . . ." 4 William Blackstone, Commentaries *223 (1765).

But venerable as they are, we need not depend solely on the words of English judges and lawyers for our protections. The Fourth Amendment carried forward and burnished the principles upon which they relied when it commanded that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." As Justice Story has told us, that amendment "seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law." *See* Joseph Story, Commentaries on The Constitution of the United States, § 1902 (2nd ed. 1851). That was echoed and elaborated upon by the redoubtable Thomas M. Cooley, who wrote: "[E]very man's house is his castle. The meaning of this is that every man under the protection of the laws may close the door of his habitation, and defend his privacy in it, not against private individuals merely, but against the officers of the law and the state itself." Thomas M. Cooley, The General Principles of Constitutional Law 218 (1891). We have often said much the same thing. *See, e.g., United States v. Becker*, 23 F.3d 1537, 1539-40 (9th Cir. 1994); *see also Wilson v. Layne*, 526 U.S. 603, 609-13, 119 S. Ct. 1692, 1697-98, 143 L.Ed.2d 818 (1999).

Of course, there can be no doubt that a person can consent to a search of his home, although we carefully scrutinize claims that he has done so. *See Shaibu*, 920 F.2d at 1425-26. There also can be little doubt that Knights did consent to searches when he agreed to the

terms of his probation.[2] But we have made it clear that his consent must be seen as limited to probation searches, and must stop short of investigation searches. We simply have refused to recognize the viability of a more expansive probationary consent to search term. That was illustrated in 1985, when we were faced with a California probationer who had not had supervision services commenced and at whose home a supposed probation search was conducted. *See Merchant*, 760 F.2d at 965. We had this to say after we reviewed the record:

> The facts show that none of the law enforcement officers reasonably could have believed that the search related to the interests of effective probation supervision. There is no showing that the state ever made any efforts toward rehabilitating Merchant. He did not receive supervision or counseling. In fact, he was never even assigned a probation officer.
>
> The search was conducted because the assistant district attorney had received reports of gunfire on Merchant's property. . . .

[2] The government suggests that we have never explicitly said that a probationer has consented to a search term. But we have, in effect, deemed that the search term is consented to—accepted—by the probationer when he is placed upon probation, and we have not questioned the binding effect of that consent. So, we have stated that a defendant's probation was "conditioned . . . on his consent" to a search term. *United States v. Merchant*, 760 F.2d 963, 964 (9th Cir. 1985). We have also described the limits of a probation search term to which, as the government there argued, the defendant had "consented" as a "condition of his probation." *United States v. Ooley*, 116 F.3d 370, 371 (9th Cir. 1997).

> These facts strongly suggest that the search was a subterfuge for conducting a criminal investigation. We have condemned the practice of using a search condition imposed on a probationer as a broad tool for law enforcement. Because the search here clearly was not a genuine attempt to enforce probation but apparently had a motive of avoidance of Fourth Amendment requirements, it is the type of law enforcement conduct that ought to be deterred. Consequently, the exclusionary rule applies with full force.

Id. at 969 (citations omitted).

That was not an unusual holding. Rather, it was one of a long line of cases. So, over ten years later we dealt with the same sort of situation. *See Ooley*, 116 F.3d at 372. There, too, a California probationer, with a consent to search term like the one in this case, claimed that a search by state law enforcement officers was merely a subterfuge. *Id.* at 372. We said, "[w]ith respect to probationers, we have long recognized that the legality of a warrantless search depends upon a showing that the search was a true probation search and not an investigation search." *Id.* And, we added, "[u]nlike an investigation search, a probation search should advance the goals of probation, the overriding aim of which 'is to give the [probationer] a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls.'" *Id.* (citation omitted); *see also United States v. Johnson*, 722 F.2d 525, 527-28 (9th Cir. 1983); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 266-67 (9th Cir. 1975) (en banc); *cf. Smith v. Rhay*, 419 F.2d 160, 162-63 (9th Cir. 1969) (parole term).

Here, the district court's determination that the purpose of the Sheriff's Department was the investigation of Knights and the termination of his nefarious career, rather than a probation search, was not clearly erroneous. Indeed, it was an almost ineluctable conclusion. Detective Hancock, and his cohorts, were not a bit interested in Knights' rehabilitation. They were interested in investigating and ending the string of crimes of which Knights was thought to be the perpetrator. That string began long before his summary probation started. In fact, his probation started just three days before the last incident. True, a probation officer may also wish to end wrongdoing by a probationer, but there was no "also" about Detective Hancock's purpose. He was performing his duty as a law enforcement officer and had drawn some very good inferences from the facts, but he was using the probation term as a subterfuge to enable him to search Knights' home without a warrant. In so doing, he crossed the frontier that separates citizen privacy from official enthusiasm. The subterfuge will not work. That would seem to bring this opinion to a logical close, but we must pause to consider a number of arguments against this result.

The government first asserts that the Supreme Court severely undercut our probation search jurisprudence when it issued *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996). In fact, says the government, our jurisprudence is so weakened that this panel should give it the slight tap that will send it crashing to the ground. We will not do that for at least two reasons beyond pure principle. In the first place, we have reiterated our rule since *Whren* was decided. *See Ooley*, 116 F.3d at 372. Secondly, the government's

argument turns on the notion that the subjective purposes of the officers should not be considered if, objectively, a probation officer could have conducted a probation search. That argument is based upon the holding of *Whren* that the reasonableness of traffic stops with probable cause does not depend upon the subjective intentions of the officers. *See Whren*, 517 U.S. at 813, 116 S. Ct. at 1774. That form of argument is far off target when applied in the context at hand. Here the issue is not whether a search or seizure with probable cause should be invalidated because of an officer's subjective intentions. It is, rather, whether, without another basis for a warrantless home search, there was consent to the search in the first place. That is a different question entirely. It depends on whether the consent covers what the officer did. *See United States v. Woodrum*, 202 F.3d 1, 12-13 (1st Cir.), *petition for cert. filed*, 69 U.S.L.W. 3087 (U.S. June 22, 2000) (No. 00-60). We recognize that the California Supreme Court disagrees with our *Whren* analysis. *See People v. Woods*, 21 Cal. 4th 668, 677-81, 981 P.2d 1019, 1025-27, 88 Cal.Rptr.2d 88, 94-97 (1999). But, then, that court does not control our reading of federal constitutional law, and for the reasons already stated, we find its analysis unpersuasive.[3] However, mention of that case does lead to another of the government's arguments.

The government asserts that in order to avoid confusing state law enforcement officers we should accept

[3] We note that three of the court's seven justices were of the same mind and vigorously dissented. *See Woods*, 21 Cal.4th at 682, 981 P.2d at 1028, 88 Cal. Rptr. 2d at 98 (Kennard, J., dissenting); *id.* at 683, 981 P.2d at 1029, 88 Cal. Rptr. 2d at 98 (Brown, J., dissenting).

the fruits of their search, even if we think that the search was unconstitutional under the United States Constitution. We think not. While state court rulings, especially on questions of state law, may be of interest, they do not determine the legality of a search for Fourth Amendment purposes. *See Ooley*, 116 F.3d at 372. Application of the exclusionary rule regarding searches does not ordinarily turn on state law, even if the state courts would take a more stringent view. *See United States v. Cormier*, 220 F.3d 1103 (9th Cir. 2000); *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993); *see also id.* at 1389 (Fernandez, J., concurring). More to the purpose, accepting the government's argument would amount to the recrudescence of the silver platter doctrine. But that platter was melted down by the Supreme Court in *Elkins v. United States*, 364 U.S. 206, 208, 80 S. Ct. 1437, 1439, 4 L.Ed.2d 1669 (1960), where the Court rejected the idea that the fruits of a search by state officers which would be unconstitutional if conducted by federal officers could be introduced in a federal criminal trial. We will not refabricate that platter.

The government passingly makes the argument that the officers relied in good faith on California law, and, therefore, suppression should not follow. We have previously rejected just that kind of argument in this context. *See Merchant*, 760 F.2d at 968-69. At any rate, the officers were not trapped into relying on some state law or ordinance which was later found to be unconstitutional. *See Illinois v. Krull*, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 1167, 94 L.Ed.2d 364 (1987); *cf. Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994). For at least three decades, it has been the law of this circuit that subterfuge probation searches are unconstitutional. Perhaps the California courts will admit the fruits of the search of Knights' residence; we will not.

Finally, argues the government, the purposes of a probation search were served because Knights was supposed to "obey all laws," was deterred by the search from being a threat to the community, and was further deterred from engaging in further criminal activity. No doubt a true probation search can serve those ends. Then, too, so does an investigative search. In fine, with its aduncous argument the government hopes to indirectly eliminate our cases which rely on the difference between probation and investigation searches. It cannot.[4]

CONCLUSION

As we enter the 21st Century, citizens find the very notion of privacy under almost relentless assault. Random suspiciousness taking and testing of body fluids proliferates on ever more flimsy grounds; motor vehicle departments sell information about those who are forced to give it in order to obtain driver's licenses; banks use private account information for other purposes and provide it to other related entities; when a consumer visits a website, a spy is placed in his computer; it has become easier to invade homes without knocking and giving notice; and on and on. In this climate, it is easy to develop callouses on our sense of privacy. Perhaps it even seems quaint to worry much

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[4] The government also suggests that because it could have obtained a warrant, it did not have to do so. To state that proposition is to refute it. *See United States v. Mejia*, 69 F.3d 309, 319-20 (9th Cir. 1995).

about the sanctity of a home where we can speak, listen, read, write and think in privacy. Perhaps it seems even more quaint to worry about "[a] probationer's home [which], like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168, 97 L.Ed.2d 709 (1987). But worry we must, and do.

We now reiterate our insistence that even when a probationer has consented to searches of his home as a condition of his probation, those searches must be conducted for probation purposes and not as a mere subterfuge for the pursuit of criminal investigations. In making this decision we need not rely on some resident numen or wait for Fulgora to light our way. We can, instead, rely upon the wisdom of the ages and upon the sagacity of the numerous Ninth Circuit judges who have written before us. If we do-not heed all of that history and learning, who will?

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARTIN J. JENKINS

No. CR-99-0108 MJJ

UNITED STATES OF AMERICA, PLAINTIFF

v.

MARK KNIGHTS; STEVEN SIMONEAU, DEFENDANTS

SAN FRANCISCO, CALIFORNIA
MONDAY, NOVEMBER 1, 1999

TRANSCRIPT OF PROCEEDINGS

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REPORTED BY: LYDIA R. RADOVICH, CSR #9223
COMPUTER-AIDED TRANSCRIPTION
BY TURBOCAT

DEPUTY WOZNIAK: Calling Criminal 99-0108, *United States of America v Mark Knights*; *United States of America v. Steven Simoneau.* Attorneys, please state your appearance for the record.

MS. BOERSCH: Good afternoon, Your Honor. Martha Boersch for the United States.

THE COURT: Good to see you.

MS. FOX: Good afternoon. Hillary Fox on behalf of Mark Knights.

THE COURT: Good afternoon. Mr. Thompson, good to see you.

MR. THOMPSON: James Thompson appearing on behalf of Mr. Simoneau, who's present in court, Your Honor.

MS. FOX: Mr. Knights is present as well.

THE COURT: Okay. The record should reflect that all counsel are present; all parties are present. You may all have a seat. The Court had the matters added to calendar to issue its decision with respect to the motions that are pending before the Court, and the Court will do that. With respect to the motion to suppress filed on behalf of Mr. Simoneau, the Court finds as follows.

First, with respect to the June 3rd search of Mr. Simoneau's pickup truck, there were several issues posited to the Court. The Court notes that the Government raised the issue of standing as to the matter, and certainly as a variant in terms of the expectation of pri[v]acy that Mr. Thompson relays, the issue of whether or not the vehicle was parked with the protections afforded by the Fourth Amendment attached.

Having reviewed the record in the matter, the Court finds that the—certainly ostensibly there is—at least there was tacit permission for the positioning of the vehicle on the roadway. And that raises a factual nexus with respect to standing. However, the Court finds that the record does not support a finding that the area where the truck was parked is within a curtilage of the homes such that its afforded protections under the Fourth Amendment.

I reached this conclusion for several reasons, including resolution of factual issues in contention. First,

with respect to the credibility issue, the testimony of Mr. Simoneau and Detective Hancock, I find that Detective Hancock was credible in this matter; I also find that Mr. Simoneau was not.

First, I find that Mr. Simoneau's testimony regarding the objects that he threw into the river, characterized as stale baguettes, was implausible for a number of reasons. One, the manner in which he carried such objects, even by his accounting, with one hand, were cradled in a way that to the Court seems inconsistent and defies common sense. The manner in which these baguettes, according to Mr. Simoneau, were carried are suggestive of greater weight and density than what would be stale bread. Moreover, the time of night that he opines that he was seeking to feed ducks. And the splashes of each of the items were sufficiently loud enough for Detective Hancock to have heard them with his naked ear from a hundred feet away.

The Court posits its credibility findings with respect to Detective Hancock and Mr. Simoneau, finding the latter not credible, is based on more than just what the Court has just recited. I find that Mr. Simoneau's testimony, specifically that he did not recall if he told Ms. O'Connor that he was involved in an accident when asked a pointed question—the "I don't recall" answer, in this Court's view, was suggestive of shaping testimony at least in a way that—the Court finds that such recall and absence of recall in a time frame where there has just been an accident and he's been ordered by an officer to remain present, that did he not recall whether he had told Miss O'Connor that he was in an accident or that an accident occurred, in the Court's view, does not

support a finding that he was credible before this Court.

Having resolved the issue of credibility and finding that—Detective Hancock, on the other hand, I did find to be credible even up to an including the fact that did he not occasion surveillance at the 5150 Wildwood address, which supports his statement that he d:d not know that Mr. Simoneau lived at that premises on an ongoing basis, just depending on Officer Hancock's testimony to be credible, and therefore I resolved the following factual conflicts regarding his testimony and document Detective Hancock's testimony: That there were cylindrical objects that he observed Mr. Simoneau carrying on the morning of June 3rd, 1998; that he observed Mr. Simoneau pick up a glass and wipe it off before walking over to—excuse me—to deposit something that he thought was a glass into the bed of the truck; and then when he came back, that Mr. Simoneau did pick up a glass and wipe it off before entering the pickup truck and driving to 5150 Wildwood.

And I further find that Officer Hancock was credible in his testimony that he could see the tailgate of the pickup and the reflectors from his location on the public thoroughfare, and 51 joins—that adjoins or is adjacent to Wildwood observed through the passenger-side window heavy-duty brass-key-type padlocks; that they were recently damaged. I find all those factual assertions to be credible, given the testimony of Detective Hancock.

Moreover, I declare that the testimony of Detective Hancock that he did see the truck's tailgate and reflectors from the public thoroughfare—I also note

Detective Hancock's testimony that he could see the tailgate and reflectors as not inconsistent with Mr. Wright's testimony.

First, Mr. Wright indicates that he only notes that Mr. Simoneau has spent the time when he comes out of his home on the morning thereafter to obtain his newspaper. Moreover, Mr. Knights does not provide specific testimony as to the location of the vehicle in the night in question, which is of crucial significance to this Court.

Second, at best, Mr. Wright's declaration indicates that one can't see into the curve when driving by, but offers no evidence on the more salient question of whether one can see into the curve from a standing position, which is where Detective Hancock indicates he made these observations from. Consistent with this finding, the record reflects that Simoneau's truck was parked closer to the street than to Mr. Wright's residence; that the truck was parked in the turn area of the roadway that's just before an easement along access to a separate home, access to which—that is that separate home is obtained via this common driveway where Simoneau's vehicle was parked.

Now having resolved those factual issues and now looking at the factors that are set forth in *U.S. v. DePuis* and several other cases that give the Court the standard pursuant to which it's determined whether or not this vehicle on this occasion was parked within the curtilage of Mr. Wright's home, I note the following.

With respect to the first factor, the areas proximity to the home, I find that the location of the truck in terms of proximity to the home certainly weighs against a finding that the vehicle was within the

curtilage. This vehicle was parked far enough down the road so as not disturb the residents of the home. And it was parked—now having made factual findings supporting and finding credible Detective Hancock's statements, it was parked at a place where the reflectors and the tail of the truck could be observed.

The second factor focuses on the nature of the uses and the intimate activities of—and whether intimate activities of the home are carried on in this area. Clearly Mr. Wright's testimony was that no such activities—family picnics, get-togethers or anything of that nature—were occurring or ever occurred in the area where Mr. Simoneau parked his vehicle. So that factor also cuts against a finding that this vehicle was parked within the curtilage.

The third factor—steps taken to protect from public view the area at issue—I note that while there are trees that do obscure views, there is no testimony that these trees were planted for the purposes of protecting the driveway from observation. And, in fact, on this factual record I have found, crediting Detective Hancock's testimony, that the vehicle was observable from the public thoroughfare. There are "No Trespass" signs posted. And, as I previously indicated, Mr. Wright's testimony in this issue was not inconsistent with the Court's finding; as he indicated, that there was a blind spot that was difficult to see from a vehicle. That is not in conflict with Detective Hancock's testimony.

Now, Simoneau's testimony that he gave Detective Hunter his driver's license prior in time to Hancock's entry onto the driveway, in this Court's view, adds nothing to the objective prong of this analysis. And to

the extent that there is an issue of the officer's subjective state of mind, having found his testimony credible that did he not know—and I do find it credible—that Simoneau lived there, is consistent with his canvassing the neighborhood to find out Simoneau's connection to the private roadway there at 5150 Wild Horse Road.

So to the extent that there was some subjective determination being made, I find, having found Detective Hancock credible, that, in fact, he did not. Therefore the fourth factor—whether the area was included within the enclosure surrounding the home—is the only factors that argues a support of finding that the vehicle was parked within the curtilage. However, the clear weight of the evidence with respect to all of the factors does not support such a finding.

As such, the observations of the truck made from a place where the officer had a right to be, inasmuch as the truck was not parked within the legal curtilage of this home, the facts that then innervate the issuance of the search warrant allowing for a search and seizure of the vehicle the Court finds to pass constitutional muster and to be reasonable.

Having made these findings, *Florida v. White* poses no legal impediment of the officer's entry on the road where the truck was parked or the observations made. Moreover, the Court finds the warrant was valid and did authorize a search of the vehicle, and that the impoundment of the vehicle was lawful.

With respect to the scope of the testimonies taken, which is the next issue addressed in this matter, from the truck, Mr. Simoneau's truck, I do find that under

Marx and several other decisions cited by Mr. Thompson, that there really is no clear nexus to criminality from several of the items that were seized. And the officer was involved in general exploration not sanctioned by a very specific search warrant.

Having made this finding, I note as follows; that in Officer Stuart's report of 6/3/98 inventorying the property seized, and more particularly items number 751, the silver and turquoise bracelet and brown and black necklace, 759, the foreign currency, seven—I have "7510," but the description is a silver-colored braided necklace and bracelet, horse pin, gold-colored ring with six rows of white stones—none of these items bear any nexus of criminality, yet are not within the scope of the warrant that authorized seizure, and therefore are suppressed.

However, I find the officer's conduct in seizing these items just referred to was not so flagrant with respect to the limitations in the search warrant such that this was a general search supporting suppression of all evidence seized. The items ordered suppressed are those specifically delineated by the Court. And with the exception of those items referenced, the defendant's motion regarding the items seized at the time of the search warrant on June 3rd is denied.

With respect to the search of the Ford wagon, license number CA3LAN399, that occurred on or about June 5th, the Court notes as follows. First, the Court finds that the officer's action in effecting the search and impound of this wagon meets the standards of reasonableness under the Fourth Amendment for the following reasons. First, the vehicle was evidence of a crime itself, having been involved in an automobile accident

just prior to its seizure. And so the automobile itself being fruits of the crime subject to seizure—as applied, the impound search under 22655.5, Subsection B, also passes constitutional muster inasmuch as there was a basis for the seizure and impound of the vehicle.

As such, the subsequent search and seizure of the items in the vehicle are justified under an inventory search rationale, and also under the doctrine of discovery in this matter. Therefore the motion to suppress the items seized from the truck on June 5th is denied.

Having ruled on the issues before the Court with respect to the motion of Mr. Simoneau, I now turn to the motion filed on behalf of Mr. Knight, and I note as follows; that Mr. Knights moves to suppress any and all items recovered in the search of his apartment on June 3rd, 1998, and on June 16, 1998.

In response, the Government contends that the defendant has consented to the search of his residence through his entry of a guilty plea and waiver of his Fourth Amendment rights as a condition and acceptance of the probation grant. In support of the its position the Government relies on *Zap v. The United States*; *U.S. v.* [*Ooley*], general concept cases. And the California Supreme Court's decision in *People v. Bravo*, wherein the Court upheld the search of a defendant's residence as a result of his consent to search as a term of probation.

Interestingly, the defendant Knight also cites to [*Ooley*] and argues that the Government's consent rationale was rejected in this case by the Ninth Circuit. The Court in [*Ooley*] did state as follows in the beginning of its analysis of the probation search. In that case the Government argues that [Ooley] consented to the warrantless search of his residence by having accepted as a condition of his probation the State's requirement that he relinquish his Fourth Amendment protections, notwithstanding his reference to the issue of consent. The Ninth Circuit remanded the case for determination of whether the search was a true probation search or not. Although not directly addressing the consent issue, [*Ooley*], implicitly if not directly, stands for the proposition that acceptance of a search clause as a condition of probation does not fully abrogate a defendant's Fourth Amendment rights.

As such, I find that [*Ooley*] cannot support the Government's consent rationale where the Court remanded the case, notwithstanding the assertion of consent as a rationale to uphold the search. Moreover, my research as failed to disclose a single federal case that has addressed the issue of consent in this context now before the Court, and determined that the acceptance of a search clause as a condition of probation constitutes a complete waiver of the party's Fourth, Amendment rights.

For instance, in *Griffin v. Wisconsin* the Supreme Court addressed the objectives served by the exercise of search pursuant to a regulatory scheme for probations. The Court sanctioned a departure from probable-cause requirement in cases involving a probationer search because the State's operation of a probation system, like its operation of a school, government office or the like, presents special needs beyond normal law enforcement that may justify departures

from the usual warrant and probable-cause requirement.

Specifically the court stated restrictions on probation liberties are meant to assure that probation serves—that the probationer serves a period of genuine rehabilitation, and that the community is not harmed by probationers being at large. These goals require the exercise of supervision to assure that restrictions are observed.

As importantly, the Wisconsin court stated that the imposition of a full-blown warrant requirement would interfere to an appreciable degree with the probation system and probation's ability to respond quickly to evidence of misconduct. In upholding the search in Wisconsin, the Court found that a tip provided by a police detective that the defendant had or may have had an illegal weapon at his home constituted the requisite reasonable grounds necessary to conduct a search.

Based on the Supreme Court's decision in Griffin, where the Court held that full-blown probable cause was not required to establish the reasonableness of a probation search under the Fourth Amendment, it seems implicit that there is some minimum expectation of pri[v]acy that remains, even post acceptance of a search clause, as a condition of probation.

Consistent with the Supreme Court's decision in *Griffin v. Wisconsin*, the First Circuit, in *U.S. v. Gianetti*, decided—which is *909 Fed. 2d 571*—stated that the permissible bounds of a probation search are governed by the following requirements. First, there

must exist a reasonable suspicion and, second, a finding that the search was a true probation search.

While the California Supreme Court authorities relied on by the Government in Bravo, *43 Cal. 3d*, and Reyes, *19 Cal. 4th*, wholly embrace the Government's rationale regarding the consensual nature of a search condition pursuant to a bargain for plea agreement and are also persuasive, [*Ooley*] clearly holds that these cases are not controlling. Whereas here the validity for a search conducted by State law enforcement officers is a question of federal law, given the Court's ruling in [*Ooley*] and the dearth of authority to support a finding of waiver in a probation-search context, I decline to adopt a rule at this juncture that—and will analyze a search here under [*Ooley*], Griffin versus—which is contained in current Ninth Circuit authority addressing validity of probation searches standard determining set forth in *Griffin v. Wisconsin*, [*Ooley*], and several other Ninth Circuit decisions, and is well defined.

These cases hold that under limited circumstances, law enforcement officers may search a probationer's home without obtaining a warrant and without probable cause. The permissible bounds of a probation search are governed by a reasonable-suspicion standard.

The Government argues here that a reasonable suspicion is not required, but if it is, the record here supports such a finding based on the Ninth Circuit decision *U.S. v. Davis, 32 Fed. 2d 752*. In Davis the Ninth Circuit defined the reasonable-suspicion standard as follows; that the officer must have a reasonable suspicion is limited to whether the item that is to be

searched is owned controlled or possessed by the probationer.

While I disagree with the Government's position regarding the requirement of reasonable suspicion, I find on this record that reasonable suspicion has demonstrated a view of Davis and the cases cited there and supports each of my conclusions in this regard, which I will discuss now.

First, regarding the requirement of a reasonable suspicion, I note that the Ninth Circuit in Davis was faced with determining the scope of the reasonable-suspicion standard as it relates to the items to be searched, because the defendant there, unlike the case at bar, conceded that the officers had the requisite reasonable suspicion to enter his residence. The Davis Court ultimately determined that the police had reasonable suspicion to search the safe at issue, as it was owned controlled or possessed by the probationer. While Davis speaks to the issue of the scope of reasonable suspicion in the probation-search context, it does not delineate the contours of the reasonable-suspicion standard in its broader application.

The standard governing reasonable suspicion required in a probation-search context is more clearly set forth in *U.S. v. Gianetta*, which is cited in the Ninth Circuit decision, and in Gianetta makes clear the reasonable standard applies to probation searches, and defines that standard more specifically that the First Circuit held, despite the absence of a regulatory scheme such as that at play in Griffin, that Griffin still applies to probation searches arising out of plea negotiations.

The Gianetta Court held that while a regulatory framework such as that operable in Griffin provides guidance to probation officers and furnishes constraints similar guides is provided in negotiated-plea context because the sentencing judge can narrowly tailor the scope of the search condition to the circumstances of the case. Therefore probation searches sanctioned by the courts that are based on reasonable [suspicion] are supported by the same special needs justifications and have the same characteristics of reasonableness as a search upheld in Griffin.

The Gianetta Court then went on to define reasonable suspicion as follows. A reasonable suspicion is a reasonable belief based on specific and articulable facts rather than a mere inchoate or unparticularized suspicion or hunch. In Gianetta the fact that the probation officer had assembled evidence of repeated unauthorized travel outside the district was sufficient. Gianetta, as I indicated previously, supports this Court's finding that as a matter of federal law, [probationers] retain some level of pri[v]acy post acceptance of a search condition.

Second, regarding whether the Government has met its burden to establish suspicion, I find the Government has met its burden with respect to the making of incendiary devices and/or participation in the arson of the PG&E equipment at Devlin Road without error. With respect to the use and possession of narcotics, first, it is clear that on a continuum reasonable suspicion requires more than a hunch, but something less than probable cause. Probable cause, in turn, requires something less than a preponderance of the evidence.

On this record the Court finds the following facts give rise to a reasonable suspicion. First, the history of vandalism of the PG&E facilities and the occurrence of that vandalism close in time to appearances made in court by Mr. Knights. Second, that Knight and Simoneau were present at Route 29 Rivendell Road (phonetic) May 24th, 1998, at approximately 10:30 near the PG&E gas line—near a PG&E gas line; and that Knight, prior in time to this, had been arrested for the theft of PG&E services, establishing some motivation.

Moreover, at the time that observation on May 24 a sheriff's deputy noticed and observed chains and pipes of the types that were used in the vandalisms, and they were seen in the trunk of Mr. Simoneau's vehicle. Thereafter Detective Hancock was aware of Clark's report of the location of Mr. Simoneau's vehicle near the 539 Brown Street residence Mr. Knights lived; and that on June 2nd, approximately one hour or so after the Devlin Road arson, Deputy Clark touched the hood of Mr. Simoneau's vehicle and found it to be warm.

Moreover, there was surveillance set up outside of Knights' residence on the evening of June 2nd and into the morning of June 3rd. And at their—at that time, Mr. Simoneau was observed carrying three cylindrical items, which I made actual findings with respect to, out of the apartment area of Mr. Knights' apartment, and to deposit those items into the Napa River.

These facts, in the Court's view, provide more than a hunch that Mr. Knights was involved in and had a motivation to be possessed of items of an incendiary nature, the manufacture of which would be inconsistent with the rehabilitative aspects of his probation. And

the Court finds requisite reasonable suspicion on this ground and on this basis alone.

The legal issue left to be determined, then, is whether the validity of—regarding the validity of this search focuses on whether the search was a true probation search or an investigative search in nature. This legal requirement, as clearly set forth in the [*Ooley*] decision, focuses on whether or not the record demonstrates that the search was to advance the goals of probation, the overriding aim of which is to give the probationer a chance to further demonstrate his rehabilitation while serving part of his sentence in the community.

The analysis is further complicated here where the search clause specifically allows for searches by peace officers, probation officers, but fails to make any mention—excuse me—but fails—but the record fails to reflect the appointment of a probation officer that the officer could contact to obtain permission to exercise on the probation clause. Because there was no assigned probation officer for Officer Handock to contact, the record here is a bit more complicated than the cases cited by counsel to the Court. While these facts complicate the analysis, they do not present insurmountable roadblocks for the resolution of this matter.

The Government asserts that the search—that a search that is motivated in whole or part by a law enforcement officer's belief that a probationer is committing a new crime serves a probationary purpose. In addition, the Government argues that efforts via search geared to determine if Mr. Knights was making explosive devices addresses issues of potential harm to the community, therefore serves an additional pro-

bationary purpose. The Government asserts through the testimony of Officer Hancock that in effecting the search of Knights' residence, the officer acted to ensure that he wasn't involved in the possession of or manufacture of any weapons, and a search to deter such conduct fosters rehabilitation and serves the objective.

Facts known to Hancock prior to the execution of the probation search, prior to the search June 1998, are the following. First, Defendant Knight suspected in a PG&E vandalism dating back to 1996. Officer Hancock was involved in that investigation.

Second, on June 2nd Hancock learned from Deputy Clark that Simoneau's truck was parked at Knights' residence roughly one hour after the Devlin Road arson. When he palpated the hood, the hood felt warm.

Third, on June 2nd Hancock learned from Deputy Hunter that Simoneau and Knight had been together in Simoneau's vehicle on May 24th at Route 29 at approximately 10:30 at night, and that Hunter had observed chains and bars, the types of objects that were used in a vandalism of PG&E equipment, in the back of Mr. Simoneau's truck, consistent with this evidence. And on June 2nd prior to surveillance of Knights' home, Hancock prepared an operations order and obtained permission to search Knights' home at a time when the objective evidence pointed to Knight as a suspect in the arson that had occurred on Devlin Road.

This evidence in its totality establishes that Knight was present with Mr. Simoneau and that he was in Simoneau's truck, where objects were observed consistent with those used to vandalize PG&E property, but even after adding in the observations that were

made on the morning of June 3rd, 1998, outside of Knights' residence, the Court finds that the objective evidence, as opposed to the subjective evidence or characterization of the purpose of the probation search, does not support the Government's conclusion that this search was conducted for purposes consistent with goals served by probation; that is to say notwithstanding Officer Hancock's testimony that he was concerned about deterring the commission of crime based on possession or manufacture of incendiary devices and effecting the search of Knights' residence, the weight of the objective evidence supports a finding that a search here was undertaken for purposes of fostering the investigation of Mr. Knights' involvement in the possession and manufacture of incendiary devices primary to obtain evidence toward a criminal investigation for arson or manufacture of those same incendiary devices. And under current Ninth Circuit law, this search was invalid here.

Just as in *U.S. v. Merchant*, Officer Hancock's failure to seek permission of the Court is objectively troulbed [*sic*]. Officer Hancock took time to seek permission from his supervisor to conduct a probation search on June 2nd, a day before the search of Knights' residence. He failed, though, to use that same time to seek permission from the Court. Merchant, a 1984 Ninth Circuit decision, clearly indicates that in the absence of an assigned probation officer, it is a sentencing judge who retains he power to require supervision of the probationer to punish violations of conditions of probation and to reoke probation. And Merchant cites California authority *In Re: Osslo*, O-s-s-l-o, at *51 Cal. 2d, 371*. Here, as in Merchant, where the issue was discussed in the context of objective good faith, I find

the objective facts strongly suggest the search was subterfuge conducting a criminal investigation.

The prosecution next argues that the Supreme Court's decision in [*Whren*] alters significantly the Court's analysis of whether the search is a true probation search or not. This is because [*Whren*] enunciates the principle under the Fourth Amendment is objective reasonableness, and where there is objective evidence to support a finding of probable cause, the Court is not to be concerned with the officer's state of mind in analyzing Fourth Amendment issues.

I find that [*Whren*] imposes no safe harbor for the Government with respect to the justification of this search. First [*Ooley*] is post [*Whren*] by a full year, yet the Ninth Circuit remanded [*Ooley*] to the trial court for purposes of ascertaining whether the search undertaken in that case was a true probation search. The standard enunciated in [*Ooley*] is consistent with the requirement that probation searches, as special needs searches, can be effected on something less than probable cause. Moreover, [*Whren*] is fully consistent with the analysis here.

Finding that, based on my view of the objective evidence without regard to subjective concerns, the weight of the objective evidence supports a finding as a matter of fact that this search was undertaken for purposes of investigating Mr. Knights' involvement in the manufacture of incendiary devices. As such, if [*Whren*] applies at all, it requires that there be objective evidence that the probation search at issue was for probation purposes. The record in this case, I have found, fails to establish any such objective evidence, other than Office Hancock's after-the-fact declaration that

this search was to determine if the defendant was committing crimes involving incendiary devices, which is inconsistent with the goals of probation.

I note that to the extent that there is any objective evidence to support the search of Mr. Knights' residence for probation purposes, it would have to be as set forth in the June 2nd request by Detective Hancock of the supervisor to effect the search for drugs. However, on this record there is no reasonable suspicion to support such a search.

Now in so ruling, I find that any probation search could be characterized in like fashion to the characterization asserted here by the Government, and would render all probation searches appropriately characterized as rehabilitative in nature as valid.

Second, in spite of the Court, the Government's questioning of the proper contours that should govern the Court's determination of whether this is a probation search or not, I am not at liberty to depart from Ninth Circuit precedent on this question.

Third, I note that the analysis of the consent-waiver issue by the California Supreme Court in cases such as Bravo, while they are persuasive, the issue in terms of the validity of the search is a matter of federal law. I say this because the government has pushed the Court to consider—and I have considered it—the quandary local law enforcement officers find themselves in, given the standards enunciated in [*Ooley*] versus the bright line rule enunciated by the California Supreme Court in Bravo. While these cases approach the issue differently, the legal positions that they articulate and the conflict emanating from these holdings has been long-

standing and has not varied over time. As such, the officers have or should have been on notice regarding the law of probation searches with respect to Ninth Circuit as a matter of federal criminal procedure and with respect to the California Supreme Court's analysis in Bravo.

Lastly, the Government offers two other alternative rationales for upholding the search of Mr. Knights' residence: The doctrine of inevitable discovery and good faith under Leon regarding inevitable discovery. The court finds that on these facts the Court has a significant question as to whether a warrant would have issued from Knights' residence. The affidavit at issue fails to set forth training and experience regarding Hancock's ability to identify the objects carried by a Simoneau on the morning of June 3rd as pipe bombs. While the record articulated based on the totality of the evidence provides, in this Court's view, a basis for a reasonable suspicion, I have already noted that that standard is less than a fair probability that is required for the issuance of a search warrant.

I find the affidavit here deficient regarding the officer's training and experience with respect to the standard necessary for the issuance of a search warrant with respect to Mr. Knights' residence. The affidavit, while articulating the vandalisms occurred within several days of Knights' arrests far conduct related to PG&E property, failed similarly to articulate any facts or officer's expertise connecting Knights' home as a place where the items of contraband might reasonably be found. Based on the absence of these facts, I find there are significant questions on this record as to whether a warrant would have issued.

Moreover, the exercise of discretion incumbent in the issuance of a search warrant by a neutral magistrate cuts against the policy that underpins the doctrine of inevitable discovery. The Court finds inevitable discovery does not support the reasonableness of the search in this matter.

Finally, the Court finds that the existence of long-standing clearly delineated case law in the Ninth Circuit regarding the standard governing probation searches, the application of the good faith rationale for upholding such a search, cut against a finding that any reasonable officer could have reasonably relied to his—in good faith on California authority solely in the exercise and effecting the search in this matter. Finding no rationale supported objectively in the record to sustain the Government's burden of proof with respect to this search of Mr. Knights' residence on June 3rd, I hereby suppress all evidence seized during that search.

Finally, with respect to the June 16th, 1998, search, having reviewed the entirety of the record, the Court finds there is clearly a basis to find common authority based on the mutual use of the property by a person, in this case defendant Knights' girlfriend, Kathy Brown. And the record supports a finding of joint access or control. Moreover, she was present on the 3rd at the time of the search, and again on the 16th.

There is one bedroom in the residence, and both Miss Brown and Mr. Knights have access to that residence and that bedroom. She was observed packing objects when the officers arrived. All these facts establish, at a minimum, access, if not control. The testimony further was that the door to the apartment was ajar and Miss

Brown allowed the officers entry, further supporting an objective finding of access and control. Under the Kelly decision of the facts as delineated by the Court, I find the officers had consent to search, and as such, I deny the request to suppress the evidence as a result of the search of Mr. Knights' residence on June 16, 1998.

Those are the rulings that the Court enters with respect to both motions to suppress in this matter.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10538
D.C. No. CR-99-00108-MJJ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARK JAMES KNIGHTS; STEVEN SIMONEAU,
DEFENDANTS-APPELLEES

[Filed: Oct. 5, 2000]

ORDER DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: CANBY, REINHARDT, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for a en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.